BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.



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| In re Applications of | ) | |
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| GTE CORPORATION, | ) | |
| Transferor, | ) | |
| | ) | |
| and | ) | CC Docket No. 98-184 |
| | ) | |
| BELL ATLANTIC CORPORATION, | ) | |
| Transferee | ) | |
| | ) | |
| for Consent to Transfer Control | ) | |

**REPLY TO OPPOSITION TO PETITION TO PROCESS**
**BELL ATLANTIC-GTE REQUEST FOR RELIEF AS A MAJOR AMENDMENT**
**AND FOR ISSUANCE OF FURTHER PUBLIC NOTICE**

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April 1, 1999

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**REPLY TO OPPOSITION TO PETITION TO PROCESS BELL ATLANTIC-GTE REQUEST FOR RELIEF AS A MAJOR AMENDMENT AND FOR ISSUANCE OF FURTHER PUBLIC NOTICE**

Sprint Communications Company L.P. ("Sprint"), by its attorneys and pursuant to Section 1.45 of the Commission's rules, hereby submits its reply to the letter submitted by Bell Atlantic and GTE[1] in opposition to Sprint's "Petition To Process Bell Atlantic-GTE Request For Relief As A Major Amendment To Application And For Issuance Of Further Public Notice" ("Petition").

## I. INTRODUCTION AND SUMMARY.

Pursuant to Section 309(b) and (c) of the Communications Act as amended, and Section 1.744(c) of the Commission's Rules, the Petition requests the Commission to process the "Report of Bell

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[1] See Letter of Steven G. Bradbury, Counsel for GTE, and Michael E. Glover, Counsel for Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, dated March 22, 1999 ("Opposition").

Atlantic and GTE on Long Distance Issues in Connection With Their Merger and Request for Limited Interim Relief" ("Request for Relief"),[2] as a major amendment to the above-referenced application ("Application"). Sprint demonstrated in the Petition that the Request for Relief seeks, *for the first time*, an "interim" waiver or forbearance from application of Section 271 to the merged entity in the form of a direct waiver of Section 271 for voice traffic as well as the less direct (but equally unlawful) modification of LATA boundaries crossed by GTE's Internet backbone network into a single, worldwide LATA. This request is a fundamental alteration of the Application as presently on file with the Commission; indeed, it is a direct assault upon one of the core provisions of the 1996 Act. It must be processed as a major amendment.

The arguments pressed by the Applicants in the Opposition do not disturb this conclusion. Indeed, the Applicants' discussion of the Public Notice issue reads like a long rear-guard action designed to cover a hasty retreat. The Applicants claim that the Request for Relief is not an amendment to the application, but an "elaboration"; even if it is an amendment, it is certainly not a major amendment; even if it is a major amendment, the filing and service of the Request for Relief (not to mention press coverage) should be sufficient notice; even if this is not deemed

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[2] See Letter of Steven G. Bradbury, Counsel for GTE, and Michael E. Glover, Counsel for Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, dated February 24, 1999, submitting the "Request for Relief" as an attachment.

sufficient notice, the pleading cycle established in the subsequent Public Notice should be abbreviated. The arguments raised in this drawn-out capitulation are, to say the least, unpersuasive. Similarly, the Applicants' effort to cast the requested relief from Section 271 as "enforcement" of Section 271 and as "temporary grandfather protection" for GTE's interLATA Internet-related services are devoid of merit.

## II. THE REQUEST FOR RELIEF MUST BE PLACED ON PUBLIC NOTICE AS A MAJOR AMENDMENT TO THE APPLICATION IF THE COMMISSION INTENDS TO CONSIDER THE REQUEST FOR RELIEF ON THE MERITS.

Sprint demonstrated in its Petition that the Request for Relief constitutes a major amendment to the Application and that Section 309 mandates that the Request for Relief be placed on Public Notice to give interested parties an opportunity to comment. In response, the Applicants make two half-hearted procedural claims. First, the Applicants claim that the Request for Relief is not a major amendment of the Application because it "simply elaborated"[3] on their treatment of the Section 271 issue in the Application and in their reply to petitions to deny. This claim is simply specious. As demonstrated in the Petition, any forthright assessment of the statements made in the Application, reply, and subsequent submissions by the Applicants yields the conclusion that the Request for Relief is a major amendment.[4]

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[3] Opposition at 1-2.

[4] The Application merely stated that Bell Atlantic "hope[d]" that it would have applied for and received any necessary 271 authority prior to the closing of the transaction, or that the Applicants would seek any necessary "transitional"

Neither the Application nor the Joint Reply requested relief *of any kind* from Section 271.

In sum, the Request for Relief is not only a new request for waiver of Section 271, it is the Applicants' first attempt to demonstrate their legal qualifications vis-à-vis Section 271. The proposition of a merged Bell Atlantic-GTE vertically integrated into a substantial interLATA business prior to Section 271 compliance and opening their markets to competition is itself independent grounds for finding the merger contrary to the public interest. Because the Request for Relief is "designed to improve the applicant's public interest showing as a justification for a waiver" and because it has "decisional significance," it must be placed on Public Notice.[5]

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relief if the FCC had not granted Section 271 authority by that time. See Application at 19, n.14. Similarly, in their reply to petitions to deny and comments filed in this proceeding, the Applicants alleged that Bell Atlantic would be able to meet the Section 271 requirements in the "vast majority" of Bell Atlantic's states prior to the consummation of the proposed merger. See Joint Reply of Bell Atlantic Corp. and GTE Corp. to Petitions to Deny and Comments, File No. 98-184, at 15 (filed Dec. 23, 1998) ("Joint Reply"). In the event Bell Atlantic would not have received Section 271 authority "in one or more" of its states, the Applicants stated that Bell Atlantic "may request limited interim relief" for the Commission to modify LATA boundaries. Id. at 16.

[5] See Washington Assoc. for Television and Children v. FCC, 665 F.2d 1264, 1271 (D.C. Cir. 1981) ("*WATCH*"). Moreover, the Applicants' claim that the Request for Relief would not be a "major" amendment under the Commission's rules is simply irrelevant, even if true (contrary to the implication of note 1 of the Opposition, Section 21.23(c) of the rules (cited by the Applicants) would allow the Commission to determine that the Request for Relief is "substantial" within the meaning of Section 309 of the Act (see 47 C.F.R. § 21.23(c)(6))). The court made clear in *WATCH* that the Commission cannot rely on rote application of its rules to determine whether an amendment is

Second, the Applicants claim that notice of the Request for Relief sufficient to meet the requirements of Section 309 has already been given. This notice apparently consists of (1) the filing of the Request for Relief on the public record, (2) service of the filing on all parties, and (3) press coverage of the filing.[6] The Applicants urge that this "notice" is sufficient under the statute because the Commission is only required to "employ a procedure reasonably calculated to achieve notice, even if all parties do not actually receive notice."[7]

The Applicants are simply incorrect. Even a demonstration of actual service upon parties to the proceeding would be insufficient for the purpose of Section 309, because Section 309 requires that non-parties be given the opportunity to become parties by filing a timely petition to deny. Entities that are not parties at present will have no such opportunity absent an additional Public Notice. Most significantly, the state public service commissions in Bell Atlantic's region and the Department of Justice are presently not parties to this proceeding; however, these entities have a substantial -- indeed statutory -- stake in the 271 process, and thus in the relief requested by the

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"major" or "minor" under Section 309. The court in *WATCH* held that regardless of the typical classification of an amendment under the Commission's rules, it was not reasonable to treat as "minor" an amendment with decisional significance. See *WATCH* at 1271.

6 Opposition at 2.

7 Id., citing Katzson Bros., Inc. v. EPA, 839 F.2d 1396, 1400 (10th Cir. 1988) ("*Katzson*").

Applicants.[8] Failure to issue a further Public Notice would make any decision reached on the basis of the Request for Relief subject to a successful challenge under Section 309.[9]

**III. THE RELIEF REQUESTED BY THE APPLICANTS IS CONTRARY TO THE LAW.**

The Applicants' effort to defend the Request for Relief under the law is even more unpersuasive than their procedural claims. First, the Applicants urge on the Commission that it has authority to "enforce" Section 271 by not enforcing the provision for 90 days following the closing on the transaction. This argument is simply fatuous.

First, the FCC in this case is not being asked simply to decline to enforce the law; it is being asked to participate, by its approval of the Application, in a transaction that will violate the very law the FCC is mandated to uphold. Second, and

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[8] Private parties such as consumers, CLECs, IXCs, Internet service providers and others may very likely have important views on the lawfulness and propriety of granting the relief requested by the Applicants.

[9] The *Katzson* decision relied upon by the Applicants is inapposite. In *Katzson* the court held that the EPA's efforts to serve process on the defendant in an administrative complaint proceeding satisfied due process even where actual notice did not occur, so long as the notice procedure employed was reasonably calculated to achieve notice. 839 F.2d at 1400. The administrative rules in that case required service upon an identifiable respondent, whereas Section 309 requires that all potentially interested entities be put on notice of a pending application or major amendment and given an opportunity to participate as parties to the proceeding. The Commission has employed no procedure here that would allow parties with interests in the enforcement of Section 271 to participate in this proceeding, because, as demonstrated above, the Applicants made no request for relief from Section 271 until February 24, 1999.

contrary to the Applicants' passing assumption, the FCC does not enjoy "exclusive" authority to enforce Section 271. In any event, the Commission cannot "decline" to enforce Section 271, even for a temporary "transitional" period. Section 10 of the Communications Act expressly prohibits the Commission from forbearing from Section 271.[10] And even if the literal terms were not crystal clear (and they are), the policy behind the statute is offended by the proposal as well. Through the enactment of Section 271, Congress intended that BOCs would have an *immediate and continuous* incentive to cooperate with competitors in order to offer long distance services within their regions; thus, *any* disruption (and certainly a disruption of this proportion) of this incentive is harmful.

The Commission's treatment of mergers involving RBOCs in the context of Section 271 is entirely consistent with this reasoning. For example, the parties in *SBC-SNET*[11] fully divested SNET's long distance businesses within SBC's service areas prior to obtaining FCC approval for the merger.[12] Contrary to the assertion of the Applicants, relief such as that sought in the Request for Relief is not "common in the context of a transfer of

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10 See 47 U.S.C. § 160(d).

11 Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp., Transferor to SBC Communications, Inc., CC Dkt. No. 98-25, *Memorandum Opinion and Order* (rel. Oct. 23, 1998) ("*SBC-SNET*").

12 See id. at 37, 51.

control"[13] where the transfer of control is premised on an RBOC request for relief from Section 271.

The Applicants' request for relief from Section 271 for GTE's existing Internetworking service through the LATA modification process fares no better under the statute, notwithstanding the Applicants' rather tortured semantic legerdemain in its defense. The Applicants' efforts in this regard are entirely directed to escaping the effect of the Commission's decision in the *Advanced Telecommunications* proceeding,[14] in which the Commission concluded that large-scale changes in LATA boundaries for packet-switched services would effectively eliminate LATA boundaries for such services and thereby "circumvent the procompetitive incentives for opening the local market to competition that Congress sought to achieve in enacting section 271 of the Act."[15] The Commission found that such requests were "functionally no different than petitioners' requests that we forbear from applying section 271 to their provision of these services."[16]

The Applicants first urge that they are not asking the Commission to "modify" Bell Atlantic's existing LATAs, rather,

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13 Opposition at 3, n.3.

14 Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Dkt. No. 98-147, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, (rel. Aug. 7, 1998).

15 Id. ¶ 81-82.

16 Id. ¶ 82.

they are asking the Commission to "establish" a new global LATA for GTE Internetworking. But there is no difference between establishing a new LATA and modifying an existing LATA for the purpose of Section 271.[17] The Commission is statutorily precluded from "modifying" existing LATAs *or* "establishing" new LATAs in a manner that undermines the purpose and intent of Section 271.

Apparently acknowledging that the Commission has rejected an exemption from Section 271 for data (or packet-switched services),[18] the Applicants next suggest that the Commission should grant the relief requested because it is not a categorical exclusion for all data services for all purposes.[19] The Applicants press upon the Commission that the GTE Internetworking relief would be "case specific (and temporary) transitional 'grandfather' protection for BBN's existing Internet and related data businesses."[20] Thus, whereas the *Advanced Telecommunications* decision involved all the large ILECs, this request is made only by GTE and Bell Atlantic; whereas *Advanced Telecommunications* involved permanent relief, the relief sought by the Applicants is "limited" to two years; whereas the services

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17 Sprint notes that, to the extent the Applicants insist it is relevant, the request plainly does seek a "modification" of Bell Atlantic's LATA boundaries as applied to the acquired GTE businesses.

18 See Opposition at 4.

19 See id. at 5.

20 Id.

proposed in *Advanced Telecommunications* had no existing customers, GTE Internetworking operates the number 5 Internet backbone service; whereas the *Advanced Telecommunications* decision involved all data services, the Applicants seek relief for GTE Internetworking's existing Internet and unspecified related data businesses. Although to state these purported distinctions is to understand why they are completely unavailing, Sprint responds to each in turn below.

First, the Commission obviously cannot assign any weight to the suggestion that this request is different because it is made by Bell Atlantic and GTE alone and does not include other RBOCs -- each RBOC in succession could (and would) file a request for relief on the same basis. Second, as explained above and in the Petition, requests for temporary relief from Section 271 are no more lawful than requests for permanent relief. Ironically, the Applicants urge upon the Commission the view that "limiting" relief for GTE Internetworking to two years "creates a powerful additional incentive" for Bell Atlantic to obtain Section 271 authority.[21] The Applicants are of course right that the ability to offer interLATA services following Section 271 approval is indeed a "powerful" incentive for RBOCs to cooperate -- that is precisely why the Request for Relief, allowing interLATA entry before cooperation has been achieved, cannot be granted.

Third, the fact that GTE Internetworking is an existing business in a competitive market is simply an argument in favor

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[21] See Opposition at 6.

of ownership of that business by an entity unencumbered by Section 271 -- in no way does it justify the evisceration of Section 271. Whatever competitive benefits flow from continued growth of the GTE Internetworking business do not depend on ownership by Bell Atlantic. Simply put, the absence of relief from Section 271 for GTE Internetworking is inimical to ownership of the business by Bell Atlantic; it is no impediment to operation of the business by a non-RBOC.

Fourth, "limiting" the relief granted to the existing GTE Internetworking services does not appear to be readily distinguishable from "all data services" as considered in the *Advanced Telecommunications* decision. The description of the services involved in the Request for Relief is sufficiently vague to admit of practically any interLATA service. GTE has elsewhere described the interLATA services offered by GTE (not necessarily limited to GNI) to include Internet backbone service, dedicated Internet connectivity to business, ISP, Web hosting customers, transport of data for America Online, SS7 service, frame relay service and private line.[22] The GTE Internetworking website includes "global services," "IP telephony," and "virtual private networks" as among the services offered by GTE Internetworking.[23] The Applicants' failure at this late date to specify exactly what

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[22] Ex parte letter of Steven G. Bradbury, Counsel to GTE, to Mr. Michael Kende and Ms. To-Quyen Troung, FCC, dated January 15, 1999, at 12.

[23] See GTE Internetworking website, Products and Services, at http://www.bbn.com/products/.

services this relief is meant to include itself makes the request ungrantable in this form.[24]

**CONCLUSION**

Despite the Applicants' attempts to obfuscate the issue, the Commission's obligation under Section 309 in this matter is clear: the Request for Relief must be placed on Public Notice with the requisite opportunity for submission of comments and petitions to deny if the Commission is to consider it in the context of this proceeding.

Respectfully submitted,

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[24] Similarly, the assertion that exempting Internet backbone services will still exclude Bell Atlantic from the larger interLATA voice business is factually suspect. Indeed, trends in the two businesses suggest that data traffic will easily eclipse voice traffic in the near future.

## CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 1st day of April, 1999, copies of the "Reply To Opposition To Petition To Process Bell Atlantic-GTE Request For Relief As A Major Amendment And For Issuance Of Further Public Notice" were served by first class mail, postage prepaid, or hand delivered as indicated, on the following parties:

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